

FCC MAIL SECTION

Federal Communications Commission

DA 99-531

MAR 23 9 45 AM '99

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Tylertown, Mississippi)

)
)
)
)
)
)

MM Docket No 97-45
RM-8961

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 10, 1999

Released: March 19, 1999

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration and Motion for Stay filed by Guaranty Broadcasting Corporation ("Guaranty Broadcasting") directed to the Report and Order in this proceeding. 13 FCC Rcd 739 (1998). TRL Broadcasting Company ("TRL Broadcasting") filed an Opposition to Petition for Reconsideration and Motion for Stay.¹ Guaranty Broadcasting filed a Reply to the Opposition. For the reasons discussed below, we deny the Petition for Reconsideration and Motion for Stay.²

Background

2. At the request of TRL Broadcasting, the Notice of Proposed Rule Making proposed the allotment of Channel 297A to Tylertown, Mississippi, as a second local FM service. 12 FCC Rcd 139 (1997). In response to the Notice, Guaranty Broadcasting, licensee of Station WBBU, Channel 297A, Baker, Louisiana, filed Comments. In its Comments, Guaranty Broadcasting referred to its simultaneously filed application to upgrade Station WBBU to Channel 297C3. In order to accommodate that upgrade,

¹On April 7, 1998, TRL Broadcasting filed a "Motion for Leave to File Response to Petition for Reconsideration and Motion for Stay." Guaranty Broadcasting filed an Opposition and TRL Broadcasting filed a Reply to that Opposition. In its Motion for Leave, TRL Broadcasting contends that it was not served with a copy of the Petition for Reconsideration and Motion for Stay as required by Section 1.420(f) of the Rules. In its Opposition, Guaranty Broadcasting submitted an affidavit stating that a copy of its Petition for Reconsideration and Motion for Stay was mailed to TRL Broadcasting's counsel. In this instance, we are unable to ascertain with certainty whether the Petition for Reconsideration and Motion for Stay was mailed and/or whether it was received by TRL Broadcasting. Moreover, any such failure appears to be inadvertent. We will grant the relief requested and consider the TRL Broadcasting Opposition to Petition for Reconsideration and Motion for Stay. This will not delay resolution of this proceeding and will enable us to resolve this proceeding on the basis of a complete record.

²TRL Broadcasting also filed a Motion to Strike directed to the Petition for Reconsideration and Motion for Stay, and Guaranty Broadcasting filed an Opposition to the Motion to Strike. The gravamen of the Motion to Strike is the fact that Guaranty Broadcasting combined a Petition for Reconsideration and a Motion for Stay into one pleading in contravention of Section 1.44(e) of the Rules. Section 1.44(e) specifically requires that such a request for stay be filed as a separate pleading. In view of our action denying the underlying Petition for Reconsideration, the Motion to Strike is now moot and need not be considered.

Guaranty Broadcasting noted that its wholly-owned subsidiary, Pearl Broadcasting Corporation, licensee of Station WHMD, Channel 296A, Hammond, Louisiana, had filed an application to relocate the Station WHMD transmitter site. In the Report and Order, we allotted Channel 297A to Tylertown, Mississippi. In taking that action, we first recognized that under normal processing procedures, the conflicting Station WBBU one-step upgrade application would have been processed as a timely filed counterproposal in this proceeding. However, the Station WBBU application was contingent on favorable action on the Station WHMD application and therefore was not acceptable for processing or consideration in the context of this proceeding. In the Report and Order, we also observed that allotting Channel 297A to Tylertown was consistent with our FM allotment priorities under which a new service is preferable to the upgrade of an existing service.

3. In the Report and Order, we addressed an allegation by Guaranty Broadcasting regarding the motivation of TRL Broadcasting in filing its underlying Petition for Rule Making in this proceeding. In this regard, Guaranty Broadcasting stated that it had "good reason to believe" that this Petition for Rule Making had been initiated by Roy E. Henderson in an effort to acquire Guaranty Broadcasting's Station KCIL, Houma, Louisiana, at a reduced purchase price. To this end, Guaranty Broadcasting submitted a statement from its treasurer, Randy W. Kendrick, concerning his meeting with Henderson. In that meeting Kendrick stated that Henderson advised him that he would be filing for the Tylertown allotment, that such an allotment would preclude Guaranty Broadcasting from upgrading Station WBBU, and that he would not go forward with a Tylertown proposal if he could acquire Station KCIL at a substantially reduced purchase price. In the Report and Order, we made two observations regarding this allegation. First, there was nothing in the record in this proceeding that would suggest that TRL Broadcasting will not apply for the Channel 297A allotment at Tylertown. Second, this proceeding was not the appropriate forum to resolve an issue pertaining to the conduct of Henderson.

4. In its Petition for Reconsideration and Motion for Stay, Guaranty Broadcasting again argues that Roy Henderson is the "real party behind TRL Broadcasting" and that Henderson filed this Petition for Rule Making solely to "gain undue leverage" in his efforts to purchase Station KCIL. As such, Guaranty Broadcasting contends that Henderson does not have the requisite bona fide intent to file an application for the Channel 297A allotment at Tylertown and this allotment should therefore be deleted.³

5. In order to consider this argument in the context of this proceeding, it is first necessary to set forth the chronology of meetings between principals of Guaranty Broadcasting and Henderson as alleged by Guaranty Broadcasting. According to Guaranty Broadcasting, on October 23, 1996, Henderson contacted its chairman, George A. Foster, expressing an interest in purchasing Station KCIL. Subsequently, on November 7, 1996, Henderson visited Foster in Baton Rouge for a "get acquainted" meeting at which Foster informed Henderson he would talk with other principals of Guaranty Broadcasting regarding a sale of Station KCIL. Thereafter, on November 19, 1996, Henderson, using two "shell companies" filed Petitions for Rule Making to allot Channel 297A to Tylertown and Channel 249C3 to Amelia, Louisiana. On December 10, 1996, Henderson met with Foster and Gregory Herpin, general manager of several Guaranty Broadcasting stations. At that meeting, Henderson advised Foster and Herpin that he was still interested in purchasing Station KCIL and that he was aware of the plan of Guaranty Broadcasting to upgrade Station WBBU (formerly WTGE) at Baker from Channel 297A to Channel 297C3. At that meeting, Henderson disclosed the fact that he had filed Petitions for Rule Making

³In its Petition for Reconsideration and Motion for Stay, Guaranty Broadcasting did not address our determinations in the Report and Order that the Station WBBU one-step upgrade was contingent and therefore not entitled to consideration as a counterproposal, and that a new allotment at Tylertown would have been preferable to an upgrade of an existing facility at Baker.

to add FM allotments at Tylertown and Amelia. In doing so, Henderson stated that a Channel 297A allotment at Tylertown would preclude Station WBBU from upgrading and that a Channel 249C3 allotment at Amelia would compete with Station KCIL. In regard to a purchase price for Station KCIL, Herpin mentioned a price of \$6,750,000, and Henderson stated that price would "be a starting point for negotiations." Finally, at their last meeting on March 7, 1997, Henderson met with Foster, Herpin, Randy Kendrick, Guaranty Broadcasting treasurer, and Bridger Eglin, Guaranty Broadcasting president. At that meeting, Henderson again advised that he wanted to purchase Station KCIL and, according to Guaranty Broadcasting, "repeated earlier threats" regarding the impact his proposed Tylertown and Amelia allotments would likely have on Guaranty Broadcasting's stations in Baker and Hboma. At that meeting, Henderson commented that the parties need "to work together" and offered \$2,000,000 for Station KCIL. At that point, Henderson stated that he would not go forward with his proposal for a Tylertown allotment if he could purchase Station KCIL at the substantially reduced price.

6. In response to the chronology of events set forth by Guaranty Broadcasting, Henderson first states that he never threatened or wished to cause harm to Guaranty Broadcasting. Rather, Henderson states that he was attempting to enter radio markets in southern Louisiana. To this end, Henderson states that he entered into "good faith" negotiations looking toward acquiring Station KCIL. According to Henderson, if he had been able to acquire Station KCIL, it would "obviate the need to seek an allotment." Henderson further states that it was always his intention to file applications for his proposed allotments if the negotiations regarding the purchase of Station KCIL were unsuccessful. Henderson also addressed the issue of the purchase price. His offer of \$2,000,000 was coupled with Guaranty Broadcasting acquiring the construction permit for his proposed Channel 249C3 allotment at Amelia.⁴ Henderson also contends that Guaranty Broadcasting "never seriously proposed a firm counter-offer" and, as a result, never learned how much he was willing to pay for Station KCIL.

7. We deny the Guaranty Broadcasting Petition for Reconsideration and Motion for Stay. As correctly noted by Guaranty Broadcasting, we will not allot a channel in the absence of a bona fide expression of interest in filing an application for that allotment. Santa Isabel, Puerto Rico, and Christiansted, Virgin Islands, 3 FCC Rcd 2336 (1988). We also note that a false statement by a party of an interest in applying for and operating a proposed station is a material misrepresentation to the Commission. See Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission Processes, 5 FCC Rcd 3911 (1990); see also Oakdale and Campti, Louisiana, 7 FCC Rcd 7600 (1992). However, there is nothing in the record of this proceeding or any other proceeding, beyond the speculation of Guaranty Broadcasting, that would suggest that Henderson will not file an application for the Tylertown allotment. Cf. Morristown, New York, 5 FCC Rcd 6976 (1990); Bagdad, Arizona, 9 FCC Rcd 70 (1993). In this vein, there is no Commission impediment that would prohibit Henderson from pursuing both the acquisition of Station KCIL and a Channel 297A allotment at Tylertown. If Henderson had acquired Station KCIL and no longer intended, for whatever reason, to pursue his proposed Channel 297A allotment at Tylertown, he could have withdrawn his Petition for Rule Making.⁵ The Petition for Rule Making was not withdrawn. We will not delete Channel 297A from

⁴On September 19, 1997, approximately six months after the last meeting between Henderson and Guaranty Broadcasting, we released a Report and Order in MM Docket No. 97-8 denying the proposed Channel 249C3 allotment at Amelia because of the unavailability of a suitable transmitter site. 12 FCC Rcd 13930 (1997). That action is now final.

⁵Pursuant to Section 1.420(j) of the Rules, any such withdrawal by Henderson would have required an affidavit certifying that he received no consideration for the withdrawal in excess of his legitimate and prudent expenses incurred in connection with the Petition for Rule Making.

Tylertown, Mississippi.

8. We would also like to address two other aspects of the Petition to Deny and Motion for Stay. First of all, any argument that the Petition for Rule Making cannot be considered because Henderson is the "real-party-in-interest" behind TRL Broadcasting is not well taken.⁶ There is no Commission proscription on a party filing a Petition for Rule Making under its business name or a requirement that a rulemaking proponent list its principals. Furthermore, a real-party-in-interest issue requires some abdication of legal control by the nominal party to the real-party-in-interest. See Paramount Stations Group of Kerrville, Inc., et al., 12 FCC Rcd 6135 (1997). In this situation, TRL Broadcasting is a sole proprietorship by Henderson. Even Guaranty Broadcasting concedes that Henderson is the "real party" behind TRL Broadcasting. Second, we continue to believe that the Channel 297A allotment at Tylertown will provide a significant public interest benefit as a second local FM service. In addition to the public interest finding, we also determine in an allotment rulemaking proceeding that the proposed channel complies with all technical requirements and that there is a bona fide expression of interest in applying for the allotment. It would not be conducive to the efficient transaction of Commission business to expand the scope of an FM allotment rulemaking proceeding to other issues. To the extent that Guaranty Broadcasting may still feel that Henderson's actions during the negotiations looking toward the sale of Station KCIL constitute misconduct, the allotment rulemaking proceeding is not the appropriate forum to resolve such an issue. Rather, in regard to the Tylertown allotment, Guaranty Broadcasting will have an opportunity to file a Petition to Deny directed to a TRL Broadcasting application for this allotment. See Monterey, Tennessee and Monticello, Kentucky, 7 FCC Rcd 1606 (1992).

9. Accordingly, IT IS ORDERED, That the aforementioned Petition to Deny and Motion for Stay filed by Guaranty Broadcasting Corporation IS DENIED.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

Charles W. Logan
Chief, Policy and Rules Division
Mass Media Bureau

⁶In his Opposition, Henderson readily stated that he is the sole owner of TRL Broadcasting and Amelia Broadcasting of Louisiana, the proponent of the Channel 249C3 at Amelia, Louisiana.